Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1500

DON R. ERICKSON, Warden
South Dakota State Penitentiary, Petitioner,

v.

United States of America ex rel.
JOHN LEE FEATHER, Respondent,
United States of America ex rel.
LAVERNE BLACK THUNDER, Respondent,
United States of America ex rel.
AMBROSE ST. JOHN, Respondent,
United States of America ex rel.
JAMES R. KEEBLE, Respondent,
United States of America ex rel.
CURTIS SMALL, Respondent,
United States of America ex rel.
ROMAN V. DERBY, Respondent,
United States of America ex rel.
JOSEPH DAY, Respondent,
United States of America ex rel.
ARNOLD LAFROMBOISE, Respondent,
United States of America ex rel.
CLARENCE WALKER, Respondent,
United States of America ex rel.
THEODORE DUANE WYNDE, Respondent.
(Nos. 73-1453 to 73-1459 and 73-1541 to 73-1543)
Eighth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Court of Appeals
(Nos. 73-1453 to 73-1459 and 73-1541 to 73-1543)

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals as yet unreported, appears at Appendix A, infra, pp. 1a-9a. The decisions and orders of United States District Court of South Dakota, Northern Division, as yet unreported appear at Appendix B, infra, pp. 10a-19a.

JURISDICTION

The judgment and opinion of the Court of Appeals was filed December 7, 1973. A timely petition for rehearing, and rehearing en blanc was denied on January 8, 1974. This petition is due on or before April 8, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

WHETHER OR NOT THE ACT OF MARCH 3, 1891, AMENDING AND RATIFYING AN 1889 AGREEMENT FOR THE OUTRIGHT CESSION AND SALE OF ALL THE UNALLOTTED LANDS OF THE LAKE TRAVERSE RESERVATION TO THE UNITED STATES GOVERNMENT FOR A SUM CERTAIN, DISESTABLISHED SAID RESERVATION AND RESTORED SAID LANDS TO THE PUBLIC DOMAIN.

STATUTES INVOLVED

Articles 3 and 10 of the Treaty of February 19, 1867, 15 Stat. 505, sections 26-30 of the Act of March 3, 1891, 26 Stat. 989, 1035, and 18 U.S.C. 1151 are set forth in Appendix C, infra, pp. 20a-39a.

STATEMENT OF THE CASE

These consolidated cases are the result of habeus corpus petitions initiated in the United States District Court of South Dakota, Northern Division, in which the petitioners below claimed that the State of South Dakota did not have jurisdiction to try, convict and sentence them to the South Dakota State Penitentiary because their criminal acts took place within the boundaries of the Lake Traverse Reservation. Accordingly, they requested that their sentences be vacated and they be released. The district court denied the writs of habeus corpus and the petitioners below appealed.

On December 7, 1973, the Eighth Circuit Court of Appeals reversed and remanded for proceedings consistent with its opinion.

ARGUMENT

I. THE DECISION OF THE COURT OF APPEALS IS IN DIRECT CONFLICT WITH A 1973 SOUTH DAKOTA SUPREME COURT CONSTRUCTION OF THE IDENTICAL ACT.

Two months prior to the decision of the Court of Appeals in the instant case, the Supreme Court of South Dakota held that the unaliotted land of the Lake Traverse Reservation had been restored to the public domain and the Lake Traverse Reservation thereby disestablishd by the identical 1891 Act considered below. **In the Matter of the Application of Cheryl Spider DeCoteau, natural mother and next friend and on behalf of Robert Lee Feather and Herbert John Spider for a Writ of Habeas Corpus (Filed October 31, 1973,** S.D.) (The **DeCoteau** opinion appears at Appendix D.) Although **DeCoteau, supra,** arose under different factual circumstances, the basic issue therein was identical to the issue in the instant case.[1]

In **DeCoteau, supra,** the Supreme Court of the State of South Dakota was completely aware of the recent decisions of the Eighth Circuit Court of Appeals and this Court construing acts similar to the Act of March 3, 1891. In numerous instances it has cited and analyzed each and every important decision in this area of the law, including **Mattz,** v. **Arnett,** 93 S. Ct. 2245 (1973). For example, in 1972 the court felt compelled to hold that boundaries of the Standing Rock Res-

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1. The same basic argument presented in this petition is also presented in a Memorandum in Response to a Petition for a Writ of Certiorari filed in this Court in the DeCoteau case. Docket No. 73-1148.

ervation were unaffected by the passage of legislation similar to the legislation construed in **Seymour** v. **Superintendent,** 368 U.S. 351, because of the broad application recently given **Seymour** by the Eighth Circuit Court of Appeals. **State of South Dakota** v. **Molash,** 199 N.W. 2d 591 (S.D. 1972).

However, in **Decoteau, supra,** the court could not agree with the rationale of either the recent Eighth Circuit decisions or the two leading decisions from this Court. Therefore, it found that the lands affected by the 1891 Act were restored to the public domain and that the Lake Traverse Reservation had been effectively disestablished. If the conclusion of the South Dakota Supreme Court is considered correct in this respect, then the petitioners below are not entitled to the relief granted by the Eighth Circuit Court of Appeals. It is beyond question that any state is entitled to exercise criminal jurisdiction over the members of any tribe in those areas **not** within the limits of a reservation so long as the situs of crime is not included within the additional definitions of Indian Country set forth at 18 U.S.C. 1151(b) or 18 U.S.C. 1115(c); the petitioners below do not fall within either of these exceptions.

As recently as 1963, the Eighth Circuit Court of Appeals agreed with this analysis when the very same act considered below was before it in **DeMarrias** v. **State of South Dakota,** 319 F. 2d 845 (1936).[2] In **DeMarrias,** the Court of Appeals affirmed the trial court's "well reasoned" opinion and agreed that the Lake Traverse Reservation had been

2. The Act of March 3, 1891, has had a long prior history of judicial interpretation, none of which is consistent with the conclusion reached by the Court of Appeals below. **Application of DeMarrias,** 107 N.W. 2d 480 (S.D. 1958). **State v. DeMarrias,** 107 N.W. 2d 255 (S.D. 1961), cert. denied, 368 U.S. 844 (1961). **DeMarrias v. State of South Dakota,** 206 F. Supp. 549 (D.S.D. 1962), and the 1963 DeMarrias decision cited above in the text of the petition.

disestablished and that therefore the area in question "was not within Indian Country." **DeMarrias, supra,** at 847.

Now, in the opinion below, the Eighth Circuit Court of Appeals has expressely overruled the **DeMarrias** decision and held that the Lake Traverse Reservation was **not** disestablished by the 1891 Act, and for all practical purposes has thereby also overruled the State Supreme Court in **DeCoteau, supra.**

Since the decision below, the state has devoted considerably more time and effort to researching the question presented. This research, most of which unfortunately was not presented to either the Eighth Circuit Court of Appeals or the South Dakota Supreme Court, convinces your Petitioner that the decision of the latter court was correct in holding that Congress intended the 1891 Act to restore all the unallotted land to the public domain and thereby disestablish the Lake Traverse Reservation—and Congress, in **this** case, was acting in accordance with the wishes of the Indians.

The Indians wanted to sell their reservation[3] and the Department of the Interior instructed the Office of Indian Affairs to negotiate "for the relinquishment of such portions of the Lake Traverse Reservation" as the Indians wanted "to release." Letter from T. J. Morgan, Commissioner of Indian Affairs to the Negotiation Commission, August 13, 1889.

In **this** case, it was to be an agreement for "the cession or relinquishment of the reservation." Letter, supra, at 2,—

3. Gabriel Renville, who was the chosen leader on the Lake Traverse Reservation at the time, expressed the view that ". . . . We never thought to keep this reservation for our lifetime . . . . " Other similar remarks were expressed in terms of the benefits of the sale, " . . . We don't expect to keep reservation. We want to get the benefit of the sale . . . " National Archives File # 26163-1889, SC 147 Sisseton.

an agreement for the outright cession and sale of the reservation by the Indians to the Government restoring the land to the public domain, notwithstanding the statement in the opinion below that "the reservation here was not sold to the government outright but merely opened for settlement under the homestead laws . . . ."

Furthermore, immediately after the passage of the act. the Lake Traverse Reservation was removed, completely and unequiocally, from the official government maps and tables recording the then existing Indian Land areas and reservations in the United States. Consistent therewith, the unambiguous phrase "former Lake Traverse Reservation" begins to appear in the official communications of the Department of the Interior and Office of Indian Affairs, in addition to other miscellaneous congressional correspondence.

In this light, the fact that there was not any discussion of reservation boundaries in the documents examined by the Court of Appeals and therefore stressed in the opinion below as in some way indicating the continued existence of the Lake Traverse Reservation, becomes somewhat of an anomaly. Boundaries of a reservation which were to be disestablished would seem to this Petitioner to be somewhat unnecessary. Presumably, the government agreed.

In the event a writ is granted in this case, the above and additional material will be presented in detail to this Court in support of the conclusion reached by the South Dakota Supreme Court.

II. WITHIN THE PAST SIX MONTHS OTHER SUBSTANTIAL CONFLICTS HAVE BECOME APPARENT WITHIN THE EIGHTH CIRCUIT, AND BETWEEN THE EIGHTH CIRCUIT COURT OF APPEALS AND THE SOUTH DAKOTA SUPREME COURT.

The wholesale application of the **Seymour, supra,** and **Mattz, supra,** rationale by the Eighth Circuit Court of Appeals to each and every piece of reservation legislation that even resembles the acts construed therein has resulted in what the South Dakota Supreme Court has aptly termed "confusion." **Cook v. State of South Dakota,** (Filed March 15, 1974, S. D.)

This "confusion" can be best illustrated by a brief review of the decisions commencing with the opinion of the Eighth Circuit Court of Appeals in **The City of New Town, North Dakota** v. **United States,** 454 F.2d 121 (CA 8 1972). In **New Town,** the Court of Appeals held that the boundaries of the Fort Berthold Reservation were not diminished by legislation that had for over fifty years been considered to have diminished the reservation. The Court based its decision on the rationale of the **Seymour** case. Six months later, the South Dakota Supreme Court in construing similar legislation affecting a South Dakota reservation, reluctantly bowed to the Eighth Circuit Court of Appeals and overruled nearly fifty years of state case law in **State of South Dakota** v. **Molash** 199 N.W. 2d 591 (S.D. 1972) The concurring opinion of Chief Justice Biegelmier suggested that it might be "in the public interest" for the state Attorney General to file a petition for certiorari and Judge Doyle concurred in the suggestion. **Molash, supra,** at 594.

At approximately the same time, the Federal District Court for the District of South Dakota construing another "similar" piece of legislation, which was before it on remand by the Eighth Circuit Court of Appeals for further consideration of the issue in light of **New Town, supra,** held that the boundaries of the Cheyenne River Reservation were not diminished. **United States ex rel Condon v. Erickson,** 344 F Supp. 777 (D.S.D. 1972).

This decision touched off a debate in the South Dakota Law Review concerning the rather conspicuous absence, in the opinions and in the briefs, of any substantial citations to legislative history. 18 S. Dak. L Rev. 85 (1973). The debate however, was not in time to affect the Eighth Circuit Court of Appeals decision in **Condon**, holding that Cheyenne River Reservation was not diminshed even though the legislation being construed therein referred **on its face** to the area unaffected by the act remaining as "the diminished reservation." **United States ex rel Condon v. Erickson,** 478 F. 2d 684 (CA 8 1973). The court termed the decision a "close" question, **Condon, supra,** at 689.

Two months later, in **Mattz, supra**, this Court stressed the importance of legislative history and found that the legislation therein did not terminate or disestablish the Klamath River Reservation. In October, the South Dakota Supreme Court, while citing **Seymour, supra, Mattz, supra,** and the recent Eighth Circuit decisions, nevertheless found that a similar act **did** express a congressional determination to terminate and disestablish a portion of the Yankton Reservation. **State of South Dakota v. Williamson,** 221 N.W. 2d 182 (S.D. 1973). Later in that same month, the court again refused to apply the rationale of **Seymour, supra, Mattz, supra,** and the recent Eighth Circuit decisions to the act in the **DeCoteau** case.

However, in December, the Eighth Circuit Court of Appeals, overruling the Federal District Court and effectively overruling the **DeCoteau** case, held in the instant case that the Lake Traverse Reservation had not been disestablished by the 1891 Act. Again, it was the rationale of **Seymour, supra,** and **Mattz, supra,** and the broad application thereof in its own recent decisions that was the deciding factor in the Court of Appeals.

The conflicts and confusion in the above decisions resulted in an extensive review of legislative history by the parties and the court in **Rosebud Sioux Tribe v. Kneip et al,** —F Supp. (D.C.S.D., February 6, 1974). In a well written and extensively documented opinion, the Federal District Court for the District of South Dakota, Western Division, in the face of **Seymour, supra, Mattz, supra,** and the recent decisions of the Eighth Circuit, held that the Rosebud Reservation had in fact been diminished by a series of bills enacted over a six-year period. Page after page of congressional documents were quoted in the text of this excellent fifty page opinion. Immediately thereafter, the Supreme Court of South Dakota held that the Pine Ridge Reservation had also been diminished by a nearly "identical" act. **Cook, supra** at 5.

If the above acts were distinguishable, either on their face or in light of their legislative history, then the conflicts and confusion rampart in the above opinions would be, in part, justifiable. After all, Indian Law is a very complex and difficult area of the law. Realistically however, this simply is not the case. Someone, somewhere, must take the necessary time and action to clarify what is rapidly becoming something more than a mere conflict within the Eighth Circuit and between the Eighth Circuit Court of Appeals and the South Dakota Supreme Court.

III. THE IMPORTANCE OF THE ISSUE TO BE RESOLVED TO THE STATE OF SOUTH DAKOTA ALONE IS BEYOND QUESTION.

The wholesale application by the Eighth Circuit Court of Appeals of the **Seymour, supra,** and **Mattz, supra,** rationale to each and every piece of reservation legislation that even resembl[illegible] the acts construed therein has effectively overruled

not less than twenty-five state and federal cases decided over a period of fifty years—and this number includes only those cases concerned with South Dakota reservations.[4] In South Dakota alone, fourteen counties, in whole or in part, with a total population of approximately 50,000 individuals, have been or in all probability will be, engulfed by the boundaries of reservations heretofore held to have been diminished or extinguished.

It is because of the far-reaching effects of the question to be decided, in addition to the conflicts and confusion discussed at II, **supra,** that your Petitioner respectfully submits that the question presented should be authoritatively resolved by this Court.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for certiori should be granted.

Respectfully submitted,

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4. Similar precedent in North Dakota and other states has also been cast aside.

APPENDIX A

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

Nos. 73-1453 to 73-1459
and
Nos. 73-1541 to 73-1543

United States of America ex rel.
John Lee Feather,
Petitioner-Appellant,
v.
Don R. Erickson, Warden
South Dakota State Penitentiary
Defendant-Appellee.

United States of America ex rel.
LaVerne Black Thunder,
Petitioner-Appellant,
v.
Don R. Erickson, Warden
South Dakota State Penitentiary
Defendant-Appellee.

United States of America ex rel.
Ambrose St. John,
Petitioner-Appellant,
v.
Don R. Erickson, Warden
South Dakota State Penitentiary
Defendant-Appellee.

United States of America ex rel.
James L. Keeble,
Petitioner-Appellant,
v.
Don R. Erickson, Warden
South Dakota State Penitentiary
Defendant-Appellee.

United States of America ex rel.
Curtis Small,
Petitioner-Appellant,
v.
Don R. Erickson, Warden
South Dakota State Penitentiary
Defendant-Appellee.

Appeal from the United States District Court For the District of South Dakota.

United States of America ex rel.
Roman V. Derby
Petitioner-Appellant,

v.

Don R. Erickson, Warden
South Dakota State Penitentiary
Defendant-Appellee.

United States of America ex rel.
Joseph Day,
Petitioner-Appellant,

v.

Don R. Erickson, Warden
South Dakota State Penitentiary
Defendant-Appellee.

United States of America ex rel.
Arnold LaFramboise
Petitioner-Appellant,

v.

Don R. Erickson, Warden
South Dakota State Penitentiary
Defendant-Appellee.

United States of America ex rel.
Clarence Walker
Petitioner-Appellant,

v.

Don R. Erickson, Warden
South Dakota State Penitentiary
Defendant-Appellee.

United States of America ex rel.
Theodore Duane Wynde,
Petitioner-Appellant,

v.

Don R. Erickson, Warden
South Dakota State Penitentiary
Defendant-Appellee.

Submitted: October 18, 1973

Filed: December 7, 1973

Before HEANEY, ROSS and STEPHENSON, Circuit Judges

These consolidated habeas corpus appeals turn upon the issue of whether alleged criminal activity took place within "Indian Country." 18 U.S.C. § 1151. We hold that the alleged crimes were committed within the confines of the Sisseton-Wahpeton (Lake Traverse) Indian reservation and therefore the State of South Dakota was without jurisdiction to convict appellants who are all enrolled Indian of the Sisseton-Wahpeton Indian tribe. The district court orders denying the writs of habeas corpus must be reversed.

"[A]ll land within the limits of any Indian reservation under the jurisdiction of the United States government, not withstanding the issuance of any patent * * * " is "Indian Country." 18 U.S.C. §1151. Any Indian who commits certain specified crimes within Indian Country is subject to the exclusive jurisdiction of the United States. 18 U.S.C. § 1153.

The individual appellants were all convicted of crimes by a South Dakota State district court and are now incarcerated at the South Dakota State Penitentiary. The facts of the respective cases are not here important. The parties agree that if the crimes were committed in Indian Country the federal district court had exclusive jurisdiction. Appellants seek release claiming they were wrongfully tried by the state court for offenses over which only the federal courts had jurisdiction.[1]

This court has previously had occasion to rule on the issue of whether the land within the original boundaries of the Lake Traverse reservation remains Indian country for 18 U.S.C. § 1151 purposes. **DeMarrias** v. **State of South Dakota**,

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[1]Two of the appellants claim tribal authority to deal with the crimes committed (forgery). 18 U.S.C. § 1152. Forgery is not one of the specified crimes within 18 U.S.C. § 1153.

319 F. 2d 845 (1963).[2] In **DeMarrias** this court adopted the trial court's opinion and determined that Congress had restored the reservation land to the public domain and thereby removed it from the category of Indian country. See **DeMarrias, supra,** affirming 206 F. Supp. 549 (D.S.D. 1962). For reasons that will become evident we find it necessary to depart from tne holding in **DeMarrias.**

The Lake Traverse reservation was established by treaty between the United States and the Sisseton-Wahpeton Sioux Indians in 1867. 15 Stat. 505. The reservation was said by Congress to be "permanent." 15 Stat. 505, 506 (Art. III).

Following the pattern as established in the General Allotmen Act of February 8, 1887[3] the "surplus" land within the Lake Traverse reservation was opened to non-Indian settlers after allotments were made to individual members of the Sisseton-Wahpeton tribe. Act of March 3, 1891. 26 Stat. 989, 1036. The area opened for settlement by the 1891 Act included all of the reservation that had not been previously allotted to tribe members.[4] The essential provisions of the 1891 Act reflect the agreement reached between the government and the Indians on December 12, 1889 whereby the Indians agreed to "cede, sell relinquish, and convey" the

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[2]The case had a long prior history before reaching our court. **State v. DeMarrias,** 107 N.W. 2d 255 (S.D. 1961), cert. denied, 368 U.S. 844 (1961); **DeMarrias v. State of South Dakota,** 206 F. Supp. 549 (D.S.D. 1962). See also **Application of DeMarrias,** 91 N.W. 2d 480 (S.D. 1958).

[3]24 Stat. 388. For an excellent general discussion of the General Allotment Act see **Mattz v. Arnett,** —U.S.—, 93 S. Ct. 2245, 2253-2254; F. Cohen, **Handbook of Federal Indian Law** (1942) at 78-79, 207-217.

[4]The 1891 Act also made provision for some additional allotments to the Sisseton-Wahpeton tribe as reparations for their loyal service to the country during the 1862 Sioux uprising. 26 Stat. 989, 1037, 1039. See also the preamble to the original treaty of 1867. 15 Stat. 505; S. Ex. Doc. No. 66, 51st Cong., 1st Sess. (189) at I.

surplus lands to the United States. 26 Stat. 1036 (Art. I). In turn, the lands were opened for settlement:

> * * * the lands by said agreement ceded, sold, relinquished and conveyed to the United States shall immediately, * * * be subject only to entry and settlement under the homestead and townsite laws of the United States * * *. 26 Stat. 1039 (§ 30).

President Benjamin Harrison formally proclaimed the lands opened for settlement. 27 Stat. 1017.

We must answer this question: Did the 1891 Act either on its face, or alternatively, when considered with the contemporaneous and subsequent legislative history, manifest Congressional intent to diminish the Lake Traverse reservation boundaries?

We have these guidelines: (1) Intent to abrogate treaty rights is not lightly imputed to Congress. **Menominee Tribe of Indians v. United States,** 391 U.S. 404, 413 (1968); (2) Congress having once established a reservation, all tracts remain a part of that reservation until separated therefrom by Congress. **United States v. Celestine,** 215 U.S. 278, 285 (1909); **Seymour v. Superintendent,** 368 U.S. 351, 359 (1962). Indeed, Congressional intent to disestablish the reservation must be either expressed on the face of the Act or be clearly discernible from the "surrounding circumstances and legislative history." **Mattz, v. Arnett,** —U.S.—, 93 S. Ct. 2245, 2258 (1973); **United States ex rel. Condon v. Erickson,** 478 F. 2d 684, 689 (CA8 1973); (3) Opening an Indian reservation for settlement by homesteading is not necessarily inconsistent with its continued existence as a reservation. **Seymour, supra. See also Condon, supra; The City of New Town, North Dakota v. United States,** 454 F.2d 121, 125 (CA8 1972); (4) The well-preserved general rule is that Indians are to be

left free from state jurisdiction and control. **McClanahan v. State Tax Commission of Arizona**, —U.S.—, 93 S. Ct. 1257 (1973); **Condon, supra** at 689 and citations. Federal jurisdiction is preferred. **McClanahan, supra.**

The case before us is not unlike **Seymour, Mattz** and **Condon.** The overall climate of legislative activity concerning Indian reservations during the period from 1887 through 1910 received its primary impetus from the General Allotment Act. See **Cohen, supra** at 78-80 (§§ 11-13). The 1891 Act, by its express terms, refers to the General Allotment Act of 1887. Just as in the beforementioned three cases, the reservation here was not sold to the government outright but merely opened for settlement under the homestead laws and the 1887 general allotment plan. Allotment and homesteading do not suggest congressional purpose to terminate the reservation. **Seymour, supra.**

Appellee leans upon a phrase extracted from section 30 of the 1891 Act.[5] The phrase ", and be subject to the laws of the state wherein located" is read by appellee to confer state jurisdiction upon the entire portion of land opened to homesteading. Appellant argues a misplaced comma and contends that only school lands, sections sixteen and thirty-six, are subject to state jurisdicition. Appellant's argument is more plausible in light of the general pattern adopted by Congress in making specific grants of these numbered sections in each township to the states. **See, e.g.,** 33 Stat. 319, 323; 35 Stat. 458, 459; 35 Stat. 460, 461; **Condon, supra** at 687 n. 5

[5]The relevant portion of section 30 states: "That the lands by said agreement ceded, sold, relinquished and conveyed to the United States shall immediately, * * * be subject only to entry and settlement under the homstead and townsite laws of the United States, excepting the sixteenth and thirty sixth sections of said lands, which shall be reserved for common school purposes, and be subject to the laws of the state wherein located * * *." 26 Stat. 1039 (§ 30) (emphasis supplied.)

(specifcally granting said sections to the states) and 28 Stat. 314, 319; 28 Stat. 326, 332; 31 Stat. 672, 676 (using the same language as the instant statute but no comma placed before the "and" of the "subject to state law" clause). We do not read this clause as a clear indication of congressional intention to terminate the Lake Traverse reservation. **Seymour, Mattz, Condon,** all **supra.**

The **Mattz** case makes clear that Congress, during the legislative years surrounding the 1891 Act "was fully aware of the means by which termination could be effected." **Mattz, supra** at 2258 & n. 22. Clear language such as that discussed in **Mattz,** expressing intent to discontinue the Lake Traverse reservation is nowhere to be found in the 1891 Act here involved.

Nothing that can be gleaned from the legislative history or subsequent legislative enactments can be fairly said to shed any further light upon the intent of the Congress regarding the reservation boundaries. The Committee reports on the 1891 Act[6] and reports on similar bills that were not enacted[7] do not discuss the proposed boundaries. The only direct reference to the boundaries of the reservation subsequent to the 1891 Act came from President Harrison in his proclamation opening the lands "within the Lake Traverse Reservation" to settlement. (emphasis supplied) 27 Stat. 1017. This reference is by no means conclusive.

Unlike the subsequent legislative treatment in **New Town** the later congressional enactments here are not "admittedly inconsistent and confusing." **New Town, supra** at 125. **Accord, Condon, supra** at 688; **Seymour, supra** at 427 n. 12.

[6]H. Rept. No. 2325, 51st Cong. 1st Sess. (1890); S. Rept. No. 1510, 51st Cong. 1st Sess. (1890).

[7]E.g., S. Rept. No. 661, 51st Cong. 1st Sess. (1890); H. Rept. No. 2271, 51st Cong. 1st Sess. (1890); S. Ex. Doc. No. 66, 51st Cong. 1st Sess. (1890).

Unlike **Mattz** we have here no evidence that "the House was generally hostile to continued reservation status of the land in question." **Mattz, supra** at 2255. Those decisions on closer facutal situations found the reservations not to have been diminished.

We must view as significant the fact that our search of the legislative documents subsequent to the 1891 Act unearths no telltale language as to the lawmaker's will concerning the boundaries of the Lake Traverse reservation. The significance lies, of course, in the test to be applied. That is, congressional expression or clear implication diminishing the reservation boundaries.

Finally, we think it noteworthy that the South Dakota Supreme Court, while interpreting an Act similar to the Act inissue here, has recognized the principles established in **Seymour** and **New Town** and denied state jurisdiction in an analogous situation. **State v. Molash,** 199 N. W. 2d 591 (1972).

Congress established the Lake Traverse reservation as a "permanent" reservation in 1867. Since that time Congress has not through clear expression or by innuendo shown an intention to disestablish.

The result we reach today is, of course, contrary to the result we reached in 1963. **DeMarrias, supra.** The more recent teachings of the United States Supreme Court and of this Court, set out above, have been premised upon legislative enactments and history analogous in all material respects to the instant case. To reach a different result in this case would be, we think, to ignore the clear impact of the decisions discussed above. We therefore now hold that the body of legislative documents concerning the Lake Traverse Indian reservation does not, against the glare of **Seymour**

and the more recent judicial guidance in **Mattz, Condon** and **New Town,** demonstrate congressional inattention to disestablish the reservation.

The boundaries of the Lake Traverse Indian reservation remain as they were established in 1867. The scene of the alleged crimes is, therefore, within Indian country. South Dakota had no jurisdiction to try appellants. The writs of habeas corpus should have been granted.

Reversed and remanded for proceedings consistent with this opinion.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT

APPENDIX B

IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

In the Matter of the Writ of
Habeas Corpus of John Lee Feather — ORDER

Upon stipulation of L. R. Gustafson, Attorney for the Plaintiff herein, and the Attorney General's Office of the State of South Dakota, for the Defendant in the above entitled matter, that the factual situation is the same as the case entitled "United States of America ex rel Douglas Blacksmith, Plaintiff, vs. Don R. Erickson, Warden of the South Dakota State Penitentiary, Defendant"; that is, that the alleged crime was committed within the confines of the Sisseton-Wahpeton Indian Reservation but not upon trust land but that the alleged crime was committed on land on which the Federal Government had no longer a trust deed title thereto, and the Court being fully apprised in the premises, it is now therefore

ORDERED that the Writ of Habeas Corpus in the above entitled matter be and the same is hereby denied.

Dated this 30th day of May, 1973.

AXEL J. BECK
U. S. District Judge

ATTEST
WILLIAM J. SRSTKA
Clerk of U. S. District Court

JUDY L. HARVEY
Deputy

(SEAL OF COURT)

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

In the Matter of the Writ of
Habeas Corpus of LaVerne Blackthunder — ORDER

Upon stipulation of L. R. Gustafson, Attorney for the Plaintiff herein, and the Attorney General's Office of the State of South Dakota, for the Defendant in the above entitled matter, that the factual situation is the same as the case entitled "United States of America ex rel Douglas Blacksmith, Plaintiff, vs. Don R. Erickson, Warden of the South Dakota State Penitentiary, Defendant"; that is, that the alleged crime was committed within the confines of the Sisseton-Wahpeton Indian Reservation but not upon trust land but that the alleged crime was committed on land on which the Federal Government had no longer a trust deed title thereto, and the Court being fully apprised in the premises, it is now therefore

ORDERED that the Writ of Habeas Corpus in the above entitled matter be and the same is hereby denied.

Dated this 30th day of May, 1973.

AXEL J. BECK
U. S. District Judge

ATTEST
WILLIAM J. SRSTKA
Clerk of U. S. District Court

JUDY L. HARVEY
Deputy

(SEAL OF COURT)

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

In the Matter of the Writ of
Habeas Corpus of Ambrose St. John — ORDER

Upon stipulation of L. R. Gustafson, Attorney for the Plaintiff herein, and the Attorney General's Office of the State of South Dakota, for the Defendant in the above entitled matter, that the factual situation is the same as the case entitled "United States of America ex rel Douglas Blacksmith, Plaintiff, vs. Don R. Erickson, Warden of the South Dakota State Penitentiary, Defendant"; that is, that the alleged crime was committed within the confines of the Sisseton-Wahpeton Indian Reservation but not upon trust land but that the alleged crime was committed on land on which the Federal Government had no longer a trust deed title thereto, and the Court being fully apprised in the premises, it is now therefore

ORDERED that the Writ of Habeas Corpus in the above entitled matter be and the same is hereby denied.

Dated this 30th day of May, 1973.

AXEL J. BECK
U. S. District Judge

ATTEST
WILLIAM J. SRSTKA
Clerk of U. S. District Court

JUDY L. HARVEY
Deputy

(SEAL OF COURT)

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

In the Matter of the Writ of
Habeas Corpus of James R. Keeble — ORDER

Upon stipulation of L. R. Gustafson, Attorney for the Plaintiff herein, and the Attorney General's Office of the State of South Dakota, for the Defendant in the above entitled matter, that the factual situation is the same as the case entitled "United States of America ex rel Douglas Blacksmith, Plaintiff, vs. Don R. Erickson, Warden of the South Dakota State Penitentiary, Defendant"; that is, that the alleged crime was committed within the confines of the Sisseton-Wahpeton Indian Reservation but not upon trust land but that the alleged crime was committed on land on which the Federal Government had no longer a trust deed title thereto, and the Court being fully apprised in the premises, it is now therefore

ORDERED that the Writ of Habeas Corpus in the above entitled matter be and the same is hereby denied.

Dated this 30th day of May, 1973.

AXEL J. BECK
U. S. District Judge

ATTEST
WILLIAM J. SRSTKA
Clerk of U. S. District Court

JUDY L. HARVEY
Deputy

(SEAL OF COURT)

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

In the Matter of the Writ of
Habeas Corpus of Curtis Small — ORDER

Upon stipulation of L. R. Gustafson, Attorney for the Plaintiff herein, and the Attorney General's Office of the State of South Dakota, for the Defendant in the above entitled matter, that the factual situation is the same as the case entitled "United States of America ex rel Douglas Blacksmith, Plaintiff, vs. Don R. Erickson, Warden of the South Dakota State Penitentiary, Defendant"; that is, that the alleged crime was committed within the confines of the Sisseton-Wahpeton Indian Reservation but not upon trust land but that the alleged crime was committed on land on which the Federal Government had no longer a trust deed title thereto, and the Court being fully apprised in the premises, it is now therefore

ORDERED that the Writ of Habeas Corpus in the above entitled matter be and the same is hereby denied.

Dated this 30th day of May, 1973.

AXEL J. BECK
U. S. District Judge

ATTEST
WILLIAM J. SRSTKA
Clerk of U. S. District Court

JUDY L. HARVEY
Deputy

(SEAL OF COURT)

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

In the Matter of the Writ of
Habeas Corpus of Roman V. Derby — ORDER

Upon stipulation of L. R. Gustafson, Attorney for the Plaintiff herein, and the Attorney General's Office of the State of South Dakota, for the Defendant in the above entitled matter, that the factual situation is the same as the case entitled "United States of America ex rel Douglas Blacksmith, Plaintiff, vs. Don R. Erickson, Warden of the South Dakota State Penitentiary, Defendant"; that is, that the alleged crime was committed within the confines of the Sisseton-Wahpeton Indian Reservation but not upon trust land but that the alleged crime was committed on land on which the Federal Government had no longer a trust deed title thereto, and the Court being fully apprised in the premises, it is now therefore

ORDERED that the Writ of Habeas Corpus in the above entitled matter be and the same is hereby denied.

Dated this 30th day of May, 1973.

AXEL J. BECK
U. S. District Judge

ATTEST
WILLIAM J. SRSTKA
Clerk of U. S. District Court

JUDY L. HARVEY
Deputy

(SEAL OF COURT)

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

In the Matter of the Writ of
Habeas Corpus of Joseph Day — ORDER

Upon stipulation of L. R. Gustafson, Attorney for the Plaintiff herein, and the Attorney General's Office of the State of South Dakota, for the Defendant in the above entitled matter, that the factual situation is the same as the case entitled "United States of America ex rel Douglas Blacksmith, Plaintiff, vs. Don R. Erickson, Warden of the South Dakota State Penitentiary, Defendant"; that is, that the alleged crime was committed within the confines of the Sisseton-Wahpeton Indian Reservation but not upon trust land but that the alleged crime was committed on land on which the Federal Government had no longer a trust deed title thereto, and the Court being fully apprised in the premises, it is now therefore

ORDERED that the Writ of Habeas Corpus in the above entitled matter be and the same is hereby denied.

Dated this 30th day of May, 1973.

AXEL J. BECK
U. S. District Judge

ATTEST
WILLIAM J. SRSTKA
Clerk of U. S. District Court

JUDY L. HARVEY
Deputy

(SEAL OF COURT)

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

In the Matter of the Writ of
Habeas Corpus of Arnold LaFramboise — ORDER

Upon stipulation of L. R. Gustafson, Attorney for the Plaintiff herein, and the Attorney General's Office of the State of South Dakota, for the Defendant in the above entitled matter, that the factual situation is the same as the case entitled "United States of America ex rel Douglas Blacksmith, Plaintiff, vs. Don R. Erickson, Warden of the South Dakota State Penitentiary, Defendant"; that is, that the alleged crime was committed within the confines of the Sisseton-Wahpeton Indian Reservation but not upon trust land but that the alleged crime was committed on land on which the Federal Government had no longer a trust deed title thereto, and the Court being fully apprised in the premises, it is now therefore

ORDERED that the Writ of Habeas Corpus in the above entitled matter be and the same is hereby denied.

Dated this 10th day of July, 1973.

AXEL J. BECK
U. S. District Judge

ATTEST
WILLIAM J. SRSTKA
Clerk of U. S. District Court

JUDY L. HARVEY
Deputy

(SEAL OF COURT)

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

In the Matter of the Writ of
Habeas Corpus of Clarence Walker — ORDER

Upon stipulation of L. R. Gustafson, Attorney for the Plaintiff herein, and the Attorney General's Office of the State of South Dakota, for the Defendant in the above entitled matter, that the factual situation is the same as the case entitled "United States of America ex rel Douglas Blacksmith, Plaintiff, vs. Don R. Erickson, Warden of the South Dakota State Penitentiary, Defendant"; that is, that the alleged crime was committed within the confines of the Sisseton-Wahpeton Indian Reservation but not upon trust land but that the alleged crime was committed on land on which the Federal Government had no longer a trust deed title thereto, and the Court being fully apprised in the premises, it is now therefore

ORDERED that the Writ of Habeas Corpus in the above entitled matter be and the same is hereby denied.

Dated this 10th day of July, 1973.

AXEL J. BECK
U. S. District Judge

ATTEST
WILLIAM J. SRSTKA
Clerk of U. S. District Court

JUDY L. HARVEY
Deputy

(SEAL OF COURT)

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

In the Matter of the Writ of
Habeas Corpus of Theodore Duane Wynde — ORDER

Upon stipulation of L. R. Gustafson, Attorney for the Plaintiff herein, and the Attorney General's Office of the State of South Dakota, for the Defendant in the above entitled matter, that the factual situation is the same as the case entitled "United States of America ex rel Douglas Blacksmith, Plaintiff, vs. Don R. Erickson, Warden of the South Dakota State Penitentiary, Defendant"; that is, that the alleged crime was committed within the confines of the Sisseton-Wahpeton Indian Reservation but not upon trust land but that the alleged crime was committed on land on which the Federal Government had no longer a trust deed title thereto, and the Court being fully apprised in the premises, it is now therefore

ORDERED that the Writ of Habeas Corpus in the above entitled matter be and the same is hereby denied.

Dated this 10th day of July, 1973.

AXEL J. BECK
U. S. District Judge

ATTEST
WILLIAM J. SRSTKA
Clerk of U. S. District Court

JUDY L. HARVEY
Deputy

(SEAL OF COURT)

APPENDIX C

Treaty of February 19, 1867

Article 3

For and in consideration of the cession above mentioned, and in consideration of the faithful and important services said to have been rendered by the friendly bands of Sissitons and Warpetons Sioux here represented, and also in consideration of the confiscation of all their annuities, reservations, and improvements, it is agreed that there shall be set apart for the members of said bands who have heretofore surrendered to the authorities of the Government, and were not sent to the Crow Creek reservation, and for the members of said bands who were released from prison in 1866, the following-described lands as a permanent reservation, viz:

Beginning at the head of Lake Travers(e), and thence along the treaty line of the treaty of 1851 to Kampeska Lake; thence in a direct line to Reipan or the northeast point of the Coteau des Prairie(s), and thence passing north of Skunk Lake, on the most direct line to the foot of Lake Traverse, and thence along the treaty-line of 1851 to the place of beginning.

Article 10

The chiefs and head-men located upon either of the reservations set apart for said bands are authorized to adopt such rules, regulations, or laws for the security of life and property, the advancement of civilization, and the agricultural prosperity of the members of said bands upon the respective reservations, and shall have authority, under the direction of the agent, and without expense to the Government, to organize a force sufficient to carry out all such rules, regulations, or laws, and all rules and regulations for the government of said Indians, as may be prescribed by the Interior Department: Provided, That all rules, regulations, or laws adopted or amended by the chiefs and head-men on either reservation shall receive the sanction of the agent.

Act of March 3, 1891, 26 Stat. 1035

Sec. 26. That the following agreement entered into on behalf of the United States by Eliphalet Whittlesey, D. W. Diggs, and Charles A. Maxwell, commissioners on the part of the United States, on the twelfth day of December, eighteen hundred and eighty-nine, wiht the Sisseton and Wahpeton bands of Dakota or Sioux Indians now on file in the Department of the Interior, signed by said commissioners for the United States, and for said Indians by Simon Ananangmari and others, is hereby accepted, ratified, and confirmed, and is in the following words, to wit:

"Whereas, by section five of the act of Congress entitled 'An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the Laws of the United States and Territories over the Indians, and for other purposes,' approved February eighth, eighteen hundred and eighty-seven, it is provided 'That at any time after lands have been allotted to all the Indian of any tribe, as herein provided, or sooner,' if in the opinion of the President it shall be for the best interests of said tribe, it shall be lawful for the Secretary of such portions of its reservations not allotted as such tribe purchase and release by the said tribe, in conformity with the treaty or statute under which such reservation is held, of such portions of its reservations not alloted as such tribe shall from time to time, consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress; and the form

and manner of executing such release shall also be prescribed by Congress.

Whereas the Sisseton and Wahpeton bands of Dakota or Sioux Indians are desirous of disposing of a portion of the land set apart and reserved to them by the third article of the treaty of February nineteenth, eighteen hundred and sixty-seven, between them and the United States, and situated partly in the State of North Dakota and partly in the State of South Dakota:

Now, therefore, this agreement made and entered into in pursuance of the provisions of the Act of Congress aproved February eighth, eighteen hundred and eighty-seven, aforesaid, at the Sisseton Agency South Dakota, on this the twelfth day of December, eighteen hundred and eighty-nine, by and between Eliphalet Whittlesey, D. W. Diggs, and Charles A. Maxwell, on the part of the United States, duly authorized and empowered thereto, and the chiefs, head-men and male adult members of the Sisseton and Wahpeton bands of Dakota or Sioux Indians, witnesseth:

ARTICLE I.

The Sisseton and Wahpeton bands of Dakota or Sioux Indians hereby cede, sell, relinquish, and convey to the United States all their claim, right title and interest in and to all the unallotted lands within the limits of the reservation set apart to said bands of Indians as aforesaid remaining after the allotments and additional allotments provided for in article four of this agreement shall have been made.

ARTICLE II.

In consideration for the lands ceded, sold, relinquished, and conveyed as aforesaid, the United States stipulates

and agrees to pay to the Sesseton and Wahpeton bands of Dakota or Sioux Indians, parties hereto, the sum of two dollars and fifty cents per acre for each and every acre thereof, and it is agreed by the parties hereto that the sum so to be paid shall be held in the Treasury of the United States for the sole use and benefit of the said bands of Indians; and the same, with interest thereon at three per centum per annum, shall be at all times subject to appropriation by Congress for the education and civilization of the said bands of Indians, or members thereof, as provided in section five of an act of Congress, approved February eighth, eighteen hundred and eighty-seven, and entitled "An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and Territories over the Indians, and for other purposes:" **Provided,** That any religious society or other organization now occupying, under proper authority, for religious or educational work among the Indians, any of the land in this agreement ceded, sold, relinquished, and conveyed shall have the right, for two years from the date of the ratification of this instrument, within which to purchase the lands so occupied at a price to be fixed by the Congress of the United States: **Provided further,** That the cession sale, relinquishment, and conveyance of the lands described in article one of this agreement shall not take effect and be in force until the sum of three hundred and forty-two thousand seven hundred and seventy-eight dollars and thirty-seven cents, together with the sum of eighteen thousand and four hundred dollars, shall have been paid to said bands of Indians, as set forth and stipulated in article third of this agreement.

ARTICLE III

The United States stipulates and agrees to pay to the Sisseton and Wahpeton bands of Dakota or Sioux Indians, parties hereto, per capita, the sum of three hundred and forty-two thousand seven hundred and seventy-eight dollars and thirty-seven cents, being the amount found to be due certain members of said bands of Indians who served in the armies of the United States against their own people, when at war with the United States, and their families and descendants, under the provisions of the fourth article of the treaty of July twenty-third, eighteen hundred and fifty-one, and of which they have been wrongfully and unjustly deprived by the operation of the provisions of an act of Congress approved February sixteenth, eighteen hundred and sixty-three, and entitled "An act for the relief of persons for damages sustained by reason of depredation, and injuries by certain bands of Sioux Indians"; said sum being at the rate of eighteen thousand four hundred dollars per annum from July first, eighteen hundred and sixty-two, to July first, eighteen hundred and eighty eight less their pro rata share of the sum of six hundred and sixteen thousand and eighty-six dollars and fifty-two cents, heretofore appropriated for the benefit of said Sisseton and Wahpeton bands of Dakota or Sioux Indians, as set forth in report numbered nineteen hundred and fifty-three, of the House of Representatives, Fiftieth Congress, first session.

The United States further agrees to pay to said bands of Indians, per capita, the sum of eighteen thousand and four hundred dollars annually from the first day of July, eighteen hundred and eighty-eight, to the first day of July, nineteen hundred and one, the latter date being the period at which the annuities to said bands of Indians were to cease, under the terms of the fourth article of the treaty of July twenty-third, eighteen hundred and fifty-one, afore-

said; and it is hereby further stipulated and agreed that the aforesaid sum of three hundred and forty-two thousand seven hundred and seventy-eight dollars and thirty-seven cents, together with the sum of eighteen thousand and four hundred dollars, due the first day of July, eighteen hundred and eighty-nine, shall become immediately available upon the ratification of this agreement.

ARTICLE IV.

It is further stipulated and agreed that there shall be allotted to each individual member of the bands of Indians, parties hereto, a sufficient quantity, which, with the lands heretofore allotted, shall make in each case one hundred and sixty acres, and in case no allotment has been made to any individual member of said bands, then an allotment of one hundred and sixty acres shall be made to such individual, the object of this article being to equalize the allotments among the members of said bands, so that each individual, including married women, shall have one hundred and sixty acres of land; and patents shall issue for the lands allotted in pursuance of the provisions of this article, upon the same terms and conditions and limitations as is provided in section five of the act of Congress, approved February eighth, eighteen hundred and eighty-seven, hereinbefore referred to.

ARTICLE V.

The agreement concluded with the said Sisseton and Wahpeton bands of Dakota or Sioux Indians, on the eighth day of December, eighteen hundred and eighty-four, granting a right of way through their reservation for the Chicago, Milwaukee Saint Paul Railway, is hereby accepted, ratified and confirmed.

ARTICLE VI.

This agreement shall not take effect and be in force until ratified by the Congress of the United States.

In witness whereof we have hereunto set our hands and seals the day and year above written.

Eliphalet Whittlesey,
D. W. Diggs,
Chas. A. Maxwell,
On the part of the United States.

The foregoing articles of agreement having been fully explained to us in open council, we, the undersigned, being male adult members of the Sisseton and Wahpeton bands of Dakota or Sioux Indians, do hereby consent and agree to all the stipulations, conditions, and provisions therein contained.

Simon Ananangmari (his x mark), and others

Sec. 27. That for the purpose of carrying out the terms and provisions of said agreement there be, and hereby is, appropriated, out of any money in the Treasury not otherwise appropriated the sum of two million two hundred and three thousand dollars, of which amount the sum of five hundred and three thousand two hundred dollars shall be immediately available, and the same, or so much thereof as may be necessary, shall be paid as follows, to wit: To the Sisseton and Wahpeton Indians, parties to this agreement, the sum of three hundred and seventy-six thousand five hundred and seventy-eight dollars and thirty-seven cents, said amount to be distributed per capita. To the scouts and soldiers of the Sisseton, Wahpeton, Medawakanton, and Wapakoota bands of Sioux Indians, who were enrolled and entered into the militar service of the United States and served in suppressing what is known as the

"Sioux outbreak of eighteen hundred and sixty-two:" or those who were enrolled and served in the armies of the United States in the war of the rebellion, and to the members of their families and descendents, now living, of such scouts and soldiers as are dead, who are not included in the foregoing class, as parties to said agreement, the sum of one hundred and twenty-six thousand six hundred and twenty dollars, said amount to be distributed per capita; and the said sum of five hundred and three thousand and two hundred dollars or so much thereof as may be necessary, when paid to the said Sisseton, Wahpeton, Medowakanton, and Wahpakoota bands of Sioux Indians, their families and descendants, designated in this act, shall be deemed a full settlement of all claims they may have for unpaid annuities, under any and all treaties or acts of Congress up to the thirtieth day of June, eighteen hundred and ninety; **Provided however,** That all contracts or agreements between said Indians or any of them, and agents, attorneys, or other persons for the payment of any part of this appropriation for or on account of fees or compensation to said agents, attorneys or other persons, unless the same have been made, as provided by law, and are yet in force and have been approved by the Department of the Interior, or have been made by and between citizens of the United States are hereby declared null and void, and in such cases the Secretary of the Interior shall cause all moneys herein appropriated to be paid directly to the said Indians and shall pay no portion of the same, to their said agents or attorneys. And in no event shall a sum exceeding ten per cent be paid to any agent or attorney, and the balance, after deducting the said five hundred and three thousand two hundred dollars, to wit, the sum of one million six hundred and ninety-nine thousand eight hundred dollars, or so much thereof as may be necessary, to pay for lands by said agreement ceded, sold, relinquished, and conveyed at the rate of two dollars and fift cents per acre, shall be

placed in the Treasury of the United States, to the credit of said Sisseton and Wahpeton bands of Dakota or Sioux Indians (parties to said agreement), and the same, with interest thereof at five per centum per annum, shall be at all times subject to appropriation by Congress or to application by order of the President for the education and civilization of said bands of Indians or members thereof.

Sec. 28. That any religious society or other organization now occupying under proper authority any of the lands by said agreement ceded, sold, relinquished, and conveyed shall have the right for a period of two years from the date hereof, within which to purchase the lands so occupied not exceeding one hundred and sixty acres in any one tract at the price paid therefor by the United States under said agreement.

Sec. 29. That in order to further carry out the provisions of said agreement and of this act, the Secretary of the Interior is authorized and directed, as soon as practicable, to cause the additional allotment provided for in said agreement to be made in the manner and form as provided in an act entitled "An act to provide for the allotments of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and Territories over the Indians, and for other purposes," and as provided in any existing amendments of said act, approved February eighth, eighteen hundred and eighty-seven, and to pay the sums hereinbefore made immediately available, first to the parties to said agreement, or their proper representatives, and to appoint suitable officers for such purposes who shall furnish bonds usual in such cases, and whose compensation and expenses shall be paid out of said available funds as the Secretary of the Interior shall direct, and whose lawful acts, when approved by him, shall be final and conclusive.

Sec. 30. That the lands by said agreement ceded, sold, relinquished, and conveyed to the United States shall immediately, upon the payment to the parties entitled thereto of their share of the funds made immediately available by this act, and upon the completion of the allotments as provided for in said agreement, be subject only to entry and settlement under the homestead and townsite laws of the United States, excepting the sixteenth and thirty-sixth sections of said lands, which shall be reserved for common school purposes, and be subject to the laws of the State wherein located; **Provided,** That patents shall not issue until the settler or entryman shall have paid to the United States the sum of two dollars and fifty cents per acre for the land taken up by such homesteader, and the title to the lands so entered shall remain in the United States until said money is duly paid by such entryman or his legal representatives, or his widow, who shall have the right to pay the money and complete the entry of her deceased husband in her own name, and shall receive a patent for the same.

18 U.S.C. 1151 (62 Stat. 757, as amended by 63 Stat. 94)

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian county", as used in this chapter, means (a) all lands within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-ways running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

APPENDIX D

#11200-a-JUD

IN THE

SUPREME COURT OF THE

STATE OF SOUTH DAKOTA

In the Matter of the Application of CHERYL SPIDER DECOTEAU, natural mother and next friend and on behalf of ROBERT LEE FEATHER and HERBERT JOHN SPIDER for a Writ of Habeas Corpus,

Petitioner and Appellant,,

v.

The District County Court for the Tenth Judicial District,

Defendant and Respondent

Appeal from the Circuit Court of Roberts County, South Dakota

---

HON. PHILO HALL, Judge

DOYLE, Justice.

This is an appeal from the judgment of the Circuit Court of Roberts County denying appellant's petition for a writ of Habeas Corpus to release her two children from the custodial process of the district county court.

The essential facts are undisputed. Appellant, Cheryl Spider DeCoteau, is the mother of Robert Lee Feather and Herbert John Spider. All are members of the Sisseton-Wahpeton Sioux Tribe. The youngest child, Robert, was

given up for adoption by his mother on March 12, 1971. The older child was placed in a foster home by the county court after neglect and dependency proceedings were initiated by the Welfare Department. Both children are in foster home care at present by order of the county court of August 4, 1972.

It was stipulated by the parties that approximately fifty per cent of the acts or omissions giving rise to the county court orders occurred on federal trust lands, and approximately fifty per cent of said acts or omissions occurred on non-Indian patented lands, all within the exterior boundaries of the Lake Traverse Reservation, as originally established by the Treaty of February 19, 1867. 15 Stat. 505.

The appellant's petition for a Writ of Habeas Corpus challenged the jurisdiction of the state court. Whether the state court had jurisdiction depnds on whether the non-Indian patened lands, where a portion of the acts or omissions occurred, are within "Indian Country".

In 1948 Congress enacted a statutory definition of what constitutes "Indian Country":

> "Except as otherwise provided in sections 1154 and 1156 of this title, the term 'Indian country', as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the orginal or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have

not been extinguished, including rights-of-way running through the same." Act of June 25, 1948, c. 645, 62 Stat. 757, as amended 18 U.S.C.A. § 1151 (1970).

If the non-Indian patented lands (situs) involved in the present case are within this definition of "Indian Country" then the state courts of South Dakota have no jurisdiction, for the law is established that state jurisdiction does not extend to Indians in "Indian Country". Williams v. Lee, 1959, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251; State of Arizona ex rel. Merrill v. Turtle, 1969, 9 Cir., 413 F.2d 683; Iron Crow v. Oglala Sioux Tribe of Pine Ridge Res., 1956, 8 Cir. 231 F.2d 89; United States ex rel. Condon v. Erickson, D.C.S.D., 344 F. Supp. 777; Smith v. Temple, 82 S.D. 650, 152 N.W2d 547; State v. Molash, 1972, S.D., 199 N.W.2d 591.

Numerous cases regarding state jurisdiction over Indians have been before this court and we have consistently held that if the reservation is disestablished by Congressional action and the situs of the act or crime is located on the portion of the reservation so dissolved, then the state courts have jurisdiction. Application of DeMarrias, 1958, 77 S.D. 294, 91 N.W.2d 480; State v. DeMarrias, 1961, 79 S.D. 1, 107 N.W.2d 255, cert. den., 368 U.S. 844, 82 S.Ct. 72 7 L.Ed.2d 42; DeMarrias v. State of South Dakota, 1962, D.C.S.D., 206 F. Supp. 549; DeMarrias v. State of South Dakota, 1963, 8 Cir., 319 F.2d 845; State ex rel. Hollow Horn Bear v. Jameson, 1959, 77 S.D. 527, 95 N.W.2d 181; Wood v. Jameson, 1964, 81 S.D. 12, 130 N.W.2d 95.

In order to determine whether the non-Indian patented lands (situs) are in "Indian Country", it is necessary to review the history of the "Lake Traverse Reservation", now

commonly known as the "Sisseton-Wahpeton Indian Reservation", and all applicable legislation pertaining thereto.

In 1867, the United States, by treaty, set aside a permanent reservation for the Sisseton and Wahpeton Bands. Treaty of February 19, 1867, 15 Stat. 505, ratified April 15, 1867, Proclamation May 2, 1867:

> "Beginning at the head of Lake Travers[e], and thence along the treaty line of the treaty of 1851 to Kampeska lake; thence in a direct line to Reipan or the northeast point of the Coteau des Prairie[s], and thence passing north of Skunk lake, on the most direct line to the foot of Lake Traverse, and thence along the treaty line of 1851 to the place of beginning."

On December 12, 1889, an "Agreement" was entered into between the United States Government and the Sisseton and Wahpeton Bands of the Dakota or Sioux Indians, Act of March 3, 1891, 26 Stat. 989 at 1036, whereby the Indians:

> "hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation set apart to said bands of Indians as aforesaid remaining after the allotments and additional allotments provided for in article four of this agreement shall have been made."

This agreement further provided that the United States would pay to the Sisseton and Wahpeton Bands of Indians the sum of two dollars and fifty cents per acre for every acre thus ceded, sold, relinquished, and conveyed to the United States. It was agreed by the parties that this sum

of money, with interest to accrue, would be held in the Treasury of the United States for the sole use and benefit of the Indians.

By the very terms of this agreement, the Sisseton and Wahpeton Bands of Indians sold their unallotted lands, and the United States Government paid a sum certain for each and every acre purchased. The money was deposited in the United States Treasury and the United States agreed to pay interest thereon. All the money was to be used for the sole benefit of the Indians. This, then, was an outright cession and sale of lands by the Indians to the United States. The land sold was separated from the reservation by Congress and became part of the public domain.[1] In this agreement the United States did not contract to act as trustee to sell the land for the Indians and credit the proceeds to the tribe. The government agreed to purchase the land outright. Therefore, the tribal title was extinguished and the reservation disestablished. The unallotted lands so sold are no longer in "Indian Country".

Appellant contends that the purpose of the Act of 1891 was to make surplus lands available to settlers. There was nothing stated in the original Agreement of 1889 about settlers purchasing or moving to the unallotted land bought by the United States Government. The Act of 1891, ratifying the Agreement of 1889, contained a section pertaining to settlers. Section 30 states:

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[1]South Dakota was admitted into the Union as a State on the express condition that its people do "agree and declare that they forever disclaim all right and title to * * * all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States * * *." Enabling Act of February 22, 1889, 25 Stat. 676, Vol. 1, SDCL p. 183, Art. XXII of our Constitution.

> "That the lands by said agreement ceded, sold, relinquished, and conveyed to the United States shall immediately, upon the payment to the parties entitled thereto of their share of the funds made immediately available by this act, and upon the completion of the allotments as provided for in said agreement, be subject only to entry and settlement under the homestead and townsite laws of the United States, excepting the sixteenth and thirty-sixth section of said lands, which shall be reserved for common school purposes, and be subject to the laws of the State wherein located * * *."

The Act of 1891, including this section, has been construed to mean that the lands so ceded and sold would be subject to the laws of the State of South Dakota. Application of DeMarrias, supra. In DeMarrias v. State of South Dakota, 1962, D.C.S.D., 206 F. Supp. 549, the court stated:

> "The said Acts of 1889 and 1891 and the President's Proclamation, supra, constitute explicit manifestations as of the effective dates thereof of an intent by the Congress to restore to the public domain all unallotted lands within the Lake Traverse Reservation which were being opened for entry and settlement under the homestead and townsite laws of the United States and to make those areas subject to the laws of South Dakota."

On appeal the Eighth Circuit, United States Court of Appeals, approved the United States District Court's "carefully considered opinion" and affirmed "the trial court's well-reasoned opinion". DeMarrias v. State of South Dakota, 1963, 8 Cir., 319 F.2d 845. We agree with these cases. Since the lands had been sold to the United States by the Indians,

the United States Government could provide the terms by which this land would be settled and sold, and also provide what jurisdiction would be established for these lands.

Appellant contends that the reasoning in the cases of Seymour v. Superintendent of Washington State Penitentiary, 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed.2d 346, and City of New Town, North Dakota v. United States, 1972, 8 Cir., 454 F.2d 121, should apply to the case before this court. In our opinion these cases do not apply as they interpret a completely different type of Act than the Act of 1891 herein involved, which is a sale and cession Act of Congress disestablishing a portion of the Sisseton and Wahpeton Reservation.

Where the language of a statute is plain and unambiguous, there is no occasion for construction. Phelps v. Life Benefit, Inc., 67 S.D. 276, 291 N.W. 919; see generally, 50 Am. Jur., Statutes, §225.

We conclude that the Act of 1891 disestablished that part of the Sisseton and Wahpeton Indian Reservation embracing the non-Indian patented land and that the trial court correctly found that the district county court had jurisdiction over the appellant for the acts or omissions that occurred in "non-Indian Country".

Affirmed.

All the Justices concur.